On February 5, 1964, Petition for Rehearing was denied. On January 27, 1964, the Appellant's motion for injunction was denied but "without prejudice to appellant's right to apply to the District Court to which the case was remanded [Northern District of Oklahoma] for transfer back." Nevertheless, Respondent District Judge, Southern District of Mississippi, on February 24, 1964, on application of the plaintiffs-appellees (Hyde) purported to dismiss the case without prejudice under F.R.Civ.P. 41(a)(1). With the case dismissed, the plaintiffs (Hyde) thereupon proposes to try the State Court suit beginning March 9, 1964. As this action of the District Court raises substantial questions whether further orders are necessary or appropriate in aid of the jurisdiction of this Court, 28 USCA §1651, or "necessary in aid of its jurisdiction, or to protect or effectuate its judgment, 28 USCA §2283, it is ORDERED that the parties show cause within ten days (see Rule 13(a)(b)(c) of this Court) why a writ of mandamus or other appropriate orders should not be issued and that pending determination of such matters, the parties are enjoined and restrained from proceeding with the case in the State Court.

Judge Cameron did not participate in this Order.

ENTER:

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By G. F. Garwihear
Deputy

New Orleans, Louisiana
Mar. 6, 1964

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21333

KOEHRING COMPANY (including its Division C. S. JOHNSON COMPANY), Petitioner

vs.

HYDE CONSTRUCTION COMPANY, INC.
and
HONORABLE S. C. MIZE, United States District Judge for the Southern District of Mississippi, Respondents

NO. 19819

KOEHRING COMPANY, ET AL., Appellants

vs.

HYDE CONSTRUCTION COMPANY, INC., Appellee.

Before CAMERON, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

Immediately after the issuance of this Court's order on Friday, March 6, 1964, Hyde Construction Company, Inc. requested opportunity to be heard immediately. Written response directed to that part of our order restraining the State Court proceeding was thereupon filed. This response and the oral presentation before a member of this panel covers all available arguments in support of the District Judge's order of dismissal and consequent absence of an order to transfer to Oklahoma. The District Judge has made full response in which he files formal assurances that the orders of this Court will be promptly executed. This response in brief shows that the

District Judge was of the opinion that, entirely consistent with our mandate, there being no answer yet filed, the Plaintiff Hyde had the unqualified right of dismissal or notice under F.R.Civ.P. 41(a)(1). On the oral presentation Tuesday, March 10, 1964, this Court was informed that subsequent to the Plaintiff's alternative motions (Parts A and B) filed on February 15, 1964, the Defendant Koehring Company served its answer on counsel for Hyde, F.R.Civ.P. 5(a)(b), the formal filing thereof under Subparagraph (d) not having been physically accomplished pending entry of an order by the District Court transferring the case to Oklahoma. There being no substantial dispute about this fact, we are of the clear view that the Plaintiff did not have the unqualified right to dismissal under F.R.Civ.P. 41(a)(1) and in view of our mandate, the District Court did not have the power or right to entertain a motion on terms or conditions. The Plaintiff's motion (Part B) did not have the effect of a "filing [of] a notice of dismissal" as of the date it was filed since it was not then a notice of dismissal, but was conditioned on adverse determination of Part A of its motion.

The result is that the District Judge was in error in undertaking to permit dismissal and in declining to order immediate transfer of the cause to the Northern District of Oklahoma as required by our prior mandate and orders. In view of the District Judge's expressed willingness to carry out our orders, we would not ordinarily enter a writ of mandamus. But since phases of the case are pending for imminent trial in the State Courts of Mississippi, and Koehring is of the view that it has a substantial basis for obtaining injunctive relief from the United States District Court for the Northern District of Oklahoma, we think that for the protection of the rights of all concerned, this order should, and hereby does, constitute

the writ of mandamus. Accordingly, the District Judge is hereby ordered to vacate the order or orders of dismissal heretofore entered on February 24, 1964, and is further ordered to immediately transfer the cause to the District Court for the Northern District of Oklahoma. This Court having the power to construe its own orders and mandates also declares that the order of January 27, 1964, its original mandate and the order of February 5, 1964, denying the petition for rehearing all affirmatively recognize that either one, or both, or all of the parties shall have the right to apply to the District Court for the Northern District of Oklahoma to have the case transferred back to the Southern District of Mississippi because of alleged changed conditions. The Clerk of the District Court shall physically transfer the papers without delay and pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma.

The issuance of this writ fully protects and effectuates the orders, judgments, and mandates of this Court and the temporary restraining order heretofore issued is no longer necessary or appropriate in aid of its jurisdiction, and such injunction and restraining order is vacated.

Judge Cameron was not available to participate in this order.

ENTER:

I CERTIFY THIS IS A TRUE COPY

/s/ John R. Brown

JOHN R. BROWN
UNITED STATES CIRCUIT JUDGE
March 10, 1964